No. 718

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, APPELLANT

v.

MICHAEL WALSH, AN INDIVIDUAL, TRADING AS KELP LABORATORIES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION.

In the District Court of the United States for the Northern District of California, Southern Division

Criminal No. 8987

UNITED STATES OF AMERICA

v.

MICHAEL WALSH, AN INDIVIDUAL, TRADING AS KELP LABORATORIES

STATEMENT AS TO JURISDICTION

In compliance with Rule 37 (a) (1) of the Federal Rules of Criminal Procedure and Rule 12 of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on September 18, 1946, dismissing the information.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246, as amended by the Act of May 9, 1942, 56 Stat. 271, 18 U. S. C., Supp. V,

682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, provides in pertinent part:

> SEC. 301 (21 U. S. C. 331). The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.
>
> * * * * * *
>
> (h) The giving of a guaranty or undertaking referred to in section 303 (c) (2), which guaranty or undertaking is false,
>
> * * *
>
> SEC. 303 (21 U. S. C. 333). Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.
>
> * * * * *

(c) No person shall be subject to the penalties of subsection (a) of this section, * * * (2) for having violated section 301 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 301 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act, * * *.

THE ISSUE AND THE RULING BELOW

The defendant was charged in an information in two counts filed in the District Court on April 25, 1946, with having given a false guaranty in violation of section 301 (h) of the Federal Food, Drug, and Cosmetic Act. The information alleged that the defendant, doing business in San Diego, California, as Kelp Laboratories, in December 1943 gave to Richard Harrison Products, of Hollywood, California, a continuing guaranty that no food, drug, device, or cosmetic thereafter shipped or delivered to Richard Harrison Products by the defendant would be adulterated or misbranded within the meaning of the Act; that in February 1945, while the guaranty was in full force and effect, the defendant consigned to Richard Harrison Products, at Hollywood, a number of packages of a vitamin product which was adulterated (count 1) and misbranded (count 2); and

that "prior and subsequent [to the date of this shipment], the said Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of a food labeled as aforesaid, which had been supplied by said defendant."

The defendant moved to dismiss the information on the ground that it did not state an offense, because it showed on its face that the shipment on which the charges were based was to a consignee within California, the state of origin, and there was no allegation that the consignee purchased the order for someone outside of California or that it intended to sell the food as part of its interstate rather than its intrastate business. The district court granted the motion to dismiss, stating that it was a close question whether Congress intended the false guaranty provision to cover an intrastate shipment to a consignee who might introduce the goods into interstate commerce where actual interstate shipment is not established, and that, therefore, the criminal provisions of the Act could not be construed to apply to such an equivocal situation. The decision of the District Court, therefore, involved a construction of the Federal Food, Drug, and Cosmetic Act, and its ruling is subject to review by the Supreme Court on direct appeal. See, e. g., *United States* v. *Borden Co.*, 308 U. S. 188, 194–195.

THE QUESTION IS SUBSTANTIAL

The decision of the District Court that the guaranty provision of Section 301 (h) of the Federal Food, Drug, and Cosmetic Act, and consequently the criminal provisions of Section 303 (a), do not apply to intrastate shipments to consignees doing business in interstate commerce unless reshipment in interstate commerce is established, is of manifest importance. Such a restrictive interpretation hampers effective administration of the Act and effectuation of its wholesome purposes to protect the public against dissemination of adulterated or misbranded food and drugs, for preventive or punitive action against persons shipping such commodities could not be taken until actual interstate shipment occurred, even though it appeared that such shipment was probable.

The guaranty provisions of the earlier Food and Drugs Act of 1906 (c. 3915, § 9, 34 Stat. 771, 21 U. S. C. 13 (1934 ed.)) were contained in a single section providing:

> SEC. 9. That no dealer shall be prosecuted under the provisions of this Act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this Act, designating it. Said guaranty, to af-

> ford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this Act.

Under that provision, therefore, the guarantor was substituted for the dealer who had received the guaranty, and was subject to such—but only such—liabilities as the dealer himself would have suffered if there had been no guaranty. Thus, under the 1906 Act, since the dealer was liable only on account of interstate shipments, the guarantor could only be prosecuted where an interstate shipment was involved (see 21 U. S. C. 2 (1934 ed.)).

In the Federal Food, Drug, and Cosmetic Act of 1938, which repealed the Act of 1906 (see § 902 (a), 52 Stat. 1059), the guaranty provisions were rewritten as indicated in the pertinent sections quoted above. In the new provisions, Congress abandoned the substitution theory of liability of the guarantor and, in lieu thereof, added a flat prohibition against giving a false guaranty. That provision (§ 301 (h)) is not limited in its application to guaranties given in connection with commodities transported or to be transported in interstate commerce. The type of guaranty, falsification of which is prohibited, is defined, by

cross-reference to Section 303 (c) (2) of the Act, as a guaranty "that such article is not adulterated or misbranded, within the meaning" of the Act. Had Congress intended to limit the application of Section 301 (h) to instances of actual interstate transportation, it would have followed the existing pattern found in the 1906 Act.

We think it is clear, therefore, that it is an offense under Section 301 (h) of the 1938 Act to give a false guaranty that articles are not adulterated or misbranded, without regard to whether they are transported or intended to be transported in interstate commerce. That the section, so construed, may apply in respect of articles not shown to have been shipped interstate does not pose any constitutional issue, since it is well established that Congress may legislate with respect to intrastate activities which so affect interstate commerce as to make their regulation an appropriate means to the attainment of a legitimate end, the exercise of the power vested in Congress to regulate interstate commerce. *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 115; *United States* v. *Darby*, 312 U. S. 100, 117–118; *Currin* v. *Wallace*, 306 U. S. 1, 11; *Consolidated Edison Co.* v. *NLRB*, 305 U. S. 197, 220–224. The necessity for regulating even purely intrastate activities for the effectuation of the federal purpose and power is apparent

here. Food and drug distributors who, as here, conduct both an interstate and intrastate business, are likely to reship in interstate commerce items which are shipped to them solely in intrastate commerce, and the fact that the goods are guaranteed might be an inducement to the distributor to introduce the product in interstate commerce without investigating as to whether they are violative of the Act. Since, in such circumstances, the distributor would be exempt from the penalties of the Act by virtue of Section 303 (c) (2), it was appropriate for Congress, in the effectuation of the purposes of the Act and to protect the integrity of guaranties it recognized, to punish the giving of a false guaranty in its inception, irrespective of whether the particular articles are ultmately shipped in interstate commerce. In this respect Section 301 (h) is like other prohibitions and controls of the Act which apply without regard to whether interstate transportation is involved. For example, Section 301 (i) (21 U. S. C. 331 (i)) prohibits the forging, counterfeiting, etc., of marks, stamps, etc., required by regulations under the Act. And Section 301 (e) (21 U. S. C. 331 (e)) prohibits the use of any representation that an application with respect to a new drug has become effective under the Act.

As we have shown, Section 301 (h) categorically prohibits the giving of a false guaranty.

Its application is not limited by its reference to Section 303 (c) (2) for a definition of the "guaranty," falsification of which is punishable, nor, as the defendant contends, by the reference in the latter section to Section 301 (a), which prohibits the introduction of adulterated or misbranded articles into interstate commerce. Section 303 (c) is, and on its face merely purports to be, an exemption from liability for the dealer who has been given a guaranty, and it is patent, therefore, that the only purpose of the reference to Section 301 (a) is to indicate the scope and application of the dealer's exemption; the reference obviously was not designed to amplify the definition of "guaranty" which follows and to which reference is made in Section 301 (h).

In view of the broad, practical, and salutary construction which the Court in *United States* v. *Dotterweich*, 320 U. S. 277,[1] stated must be given the Act, and in view of the unambiguous and unequivocal prohibition against the giving of false guarantees, we submit that the decision of the District Court is erroneous and in derogation of national policy. And the rule that criminal statutes must be strictly construed, upon which the District Court relied, does not require that the beneficent purposes of the Act should be frus-

[1] Cf. also *Arner* v. *United States*, 142 F. 2d 730, 736 (C. C. A. 1), certiorari denied, 323 U. S. 730; *United States* v. *Lee*, 131 F. 2d 464, 466 (C. C. A. 7).

trated by an artificial interpretation of language which, on its face, and in keeping with those purposes, clearly proscribes the acts charged in the information. See *United States* v. *Dotterweich*, 320 U. S. at 283; *United States* v. *Research Laboratories*, 126 F. 2d 42, 45 (C. C. A. 9), certiorari denied, 317 U. S. 656.

Appended hereto is a copy of the oral opinion rendered by the District Court on July 11, 1946.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

JAMES M. CARTER,
United States Attorney for the Southern District of California.

In the United States District Court for the Southern District of California, Southern Division

Honorable J. F. T. O'Connor, Judge Presiding

No. 8987 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHAEL WALSH, AN INDIVIDUAL TRADING AS KELP LABORATORIES, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

San Diego, California, Thursday, July 11, 1946

* * * * * *

The COURT. It is a very close question here raised. Unless the act can be justified under the interstate commerce laws of the Constitution, of course it is unconstitutional. Probably the most discussed and analyzed constitutional provision is the one on interstate commerce. My recollection of the first case was *Gibbs* v. *Hogan*. Since the enactment of the Fair Labor Standards Act there has been a renewed discussion and a great number of decisions construing the interstate commerce application to various facts. This court is bound by the decisions of the Supreme Court of the United States in all of those matters.

Under the Fair Labor Standards Act there seems to be no limit to the extension of that particular act of Congress on the questions raised as to how it is extended. One of the very late decisions is *Borden Company* v. *Borella,* 325 U. S. 679. In that case the Borden Company had its principal offices in New York. It owned and operated an office building in which 58 per cent of the rental space was used for its central office for production of goods for interstate commerce, although the goods were actually produced at plants located elsewhere. Now, there were no goods at all manufactured or placed in interstate commerce in the state of New York.

The Supreme Court, with the vigorous dissent by the Chief Justice of the United States, held that it was not necessary to produce any goods for interstate commerce if the company managed its business from the state employees in that office and in that building—they were held engaged in the production of goods for interstate commerce although no goods were produced for interstate commerce in that state. Chief Justice Stone said in part in his dissent:

> The fact that it is convenient or even necessary for the president of the company to ride in an elevator does not seem to me to meet the requirement of the statute that the occupation must be one necessary to the physical process of production. The statute includes those who are necessary to that

process, but it does not also include those are necessary to them. The manufacturing process could proceed without many activities which are necessary or convenient to the executive officers of a manufacturing company but which do not in any direct or immediate manner contribute to the manufacturing process, as did the services rendered in *Kirschbaum Company* v. *Walling, supra.*

The services rendered in this case would seem to be no more related, and no more necessary to the processes of production than the services of the cook who prepares the meals of the president of the company or the chauffeur who drives him to his office. *McLeod* v. *Threlkeld,* 319 U. S. 491. All are too remote from the physical process of production to be said to be, in any practical sense, a part of or necessary to it. I would reverse the judgment. Mr. Justice Roberts joins in this opinion.

There is another opinion, and I do not have the citation at hand, but it was rendered about the same time, in which the Supreme Court held that certain goods were produced in the city of New York and sold to a company and the second company placed the goods in interstate commerce. The manufacturing company put no goods in interstate commerce, merely sold them to another company which in turn did place them in interstate commerce.

The Supreme Court for the United States in another case held that a janitor of a building who was not employed by and had no connection with the company that had rented space in the building and was engaged in interstate commerce, that the janitor was engaged in production of goods for interstate commerce and came under the Fair Labor Standards Act.

In *Warren-Bradshaw Drilling Company* v. *Hall,* 317 U. S. 88, an independent contractor who drilled holes in the ground to produce oil and had no other connection with the oil company or the production of oil for interstate commerce and did not produce oil for interstate commerce except that it drilled the holes and was paid for that particular operation, it was held that the employees of the independent drilling company were producing goods for interstate commerce and came under the provisions of the Fair Labor Standards Act.

In *Jewell Ridge Coal Company* v. *Local 6167* in 325 U. S. 161, the Supreme Court went so far as to hold null and void a collective bargaining agreement, against because of the Fair Labor Standards Act. There was dissent from the majority opinion by the Chief Justice, Mr. Justice Roberts, and Mr. Justice Frankfurter.

Again the Supreme Court of the United States in *10 East 40th Street Building, Inc.,* v. *Callus, et al.,* in 325 U. S. 578, held:

Maintenance employees of a typical metropolitan office building, operated as an independent enterprise, which is used and to be used for offices by every variety of tenants, including some producers of goods for commerce, held not to have such a close and immediate tie with the process of production as to be deemed engaged in an occupation necessary to the production of goods for commerce, within the meaning of Section 3 (j) of the Fair Labor Standards Act, and therefore not covered by the act.

Mr. Justice Frankfurter wrote the opinion. The Chief Justice Stone referred to his opinion in the *Borden* v. *Borella* case and stated that his views there would control his decision in this case. Mr. Justice Murphy dissented.

These few cases are mentioned to indicate the flux of the law and somewhat the uncertainty as to just what extent the Supreme Court of the United States, which controls all of the decisions of this court, have found in these particular cases.

Now, will the Supreme Court extend or interpret the particular sections of this particular Food and Drug Act as they have the Fair Labor Standards Act?

There are those who contend there is nothing left for the states in the way of intrastate commerce. A farmer who brings his potatoes to sell in the city could probably be charged with the

knowledge that some of those potatoes are going into interstate commerce. The same is true of eggs or any other products that are farmed.

The information in the case before the court alleges that Richard Harrison Products was engaged in the business of introducing and delivering for introduction into interstate commerce quantities of food labeled as aforesaid which had been supplied by the said defendant. Therefore, the sole issue under this motion before the court is whether or not packages delivered under the act to Richard Harrison Products by the defendant Michael Walsh, an individual trading as Kelp Laboratories, which might never go into interstate commerce—the mere fact that they might place these particular packages in interstate commerce is sufficient according to the contention of the government.

It is the government's position that it is not necessary to follow the particular shipment here by the defendant into the channels of interstate commerce, that they might rest in Hollywood, having been shipped from San Diego, and be sold locally to a drug store or some other purchaser in Hollywood; that is a violation of the statute because some other packages were shipped in interstate commerce. The information alleges that similar packages had been shipped and labeled similar to the particular one before the court by the Richard Harrison Products.

I believe you will all agree that it is a very close question. There is no decision exactly in point. There is a distinction between the interpretation of the Fair Labor Standards Act and this particular Pure Food and Drug Act in that the court is now confronted with the statute, Section 333, Title 21 U. S. C. A., which provides:

> Any person who violates any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than $1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final, such person shall be subject to imprisonment for not more than three years, or a fine of not more than $10,000, or both such imprisonment and fine.

We all know that criminal statutes must be strictly construed and shall not be extended by the courts so as to brand individuals as criminals unless there is clear authority under the law to do so.

The Government asks this court to assume that the particular shipment in question and described in the information will be placed in interstate commerce and thus bring the defendant within the terms of the act. I do not believe that it is the policy of Congress or of the courts to extend

criminal statutes or to anticipate acts which are not criminal at the time and which might never become criminal in order to find the defendant guilty. Such an interruption of business would do violence to all the civil rights of an individual.

Courts are instituted to not only enforce the law against those who violate it but to protect those who have not violated the law even charged with an offense.

The court has spent considerable time reviewing this particular law when the court tried the case of Barnes. That is found in 142 Fed. (2d) 648. Barnes was found guilty in my court and the decision was affirmed by the Ninth Circuit.

The motion to dismiss on all the grounds urged by the defendant will be granted and exception will be allowed to the Government.

U. S. GOVERNMENT PRINTING OFFICE 1946